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No. 82-963

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1982

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

OSBORNE SHEPPARD,

Respondent.

On Writ of Certiorari To The
Supreme Judicial Court Of
Massachusetts

BRIEF OF AMICUS CURIAE ON BEHALF OF THE PETITIONER

Appellate Committee of the
California District
Attorneys Association

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BRIEF OF AMICUS CURIAE

Amicus Curiae, Appellate Committee of the California District Attorneys Association and Robert H. Philibosian, District Attorney of Los Angeles County, are filing this brief accompanied by written consent of all parties to the case pursuant to Supreme Court Rule 36(2).

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INTEREST OF AMICUS CURIAE[1]

The Appellate Committee of the California District Attorneys Association is a committee created by the District Attorneys of California to utilize and coordinate the resources of District Attorneys' offices throughout the state, for the purpose of presenting their views on

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[1] Amicus is seeking leave to file an amicus brief on behalf of the Petitioner in the case of The State of Colorado v. Quintero, No. 82-1711, which addresses the good faith exception to the exclusionary rule under circumstances where a police officer acts without a warrant or other judicial mandate and seizes evidence and where the officer's conduct is both subjectively and objectively reasonable. Although this Court has accepted for hearing a third case, United States v. Leon, 82-1771, Amicus has not filed a motion for leave to file an amicus brief therein since the Amicus believes that the search and seizure made incident to the execution of a search warrant in United States v. Leon, supra, is independently lawful under authority of Illinois v. Gates (1983) ___ U.S. ___, 103 S.Ct. 2317.

behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has concluded that the outcome of this case will have substantial impact upon the administration of criminal justice throughout California. Accordingly, the Committee has decided to move for leave of this court to file an Amicus Curiae brief herein. The Office of the District Attorney of the County of Los Angeles has been requested to prepare and submit this brief. The District Attorney of the County of Los Angeles is an authorized law officer of the County, which is a political subdivision of the State of California (see Supreme Court Rule

36(4)).

The central day-to-day function of the offices whose members constitute the California District Attorneys Association is to aid in the successful discovery, apprehension, and prosecution of those who commit crimes. Therefore, the Association and its membership have a vital interest in urging this Court to adopt the good faith exception to the exclusionary rule as set forth herein. It is felt by Amicus that such a rule is a reasonable modification on the present rule excluding previously seized relevant evidence.

Amicus curiae has researched and analyzed the development of the exclusionary rule. Amicus has studied the opinion of the

Supreme Judicial Court of Massachusetts. Amicus is intimately familiar with the impact of the exclusionary rule on prosecution of crime in California. It is felt that Amicus' analysis of the issues, with specific reference to the experience in California, will be of assistance to this Court in its resolution of the issues of law presented by this case.

SUMMARY OF ARGUMENT

This brief urges that where a police officer, in good faith, seeks and obtains judicial authorization to search and seize property pursuant to a search warrant, the evidence obtained should not be suppressed.

Unfettered application of the rule which suppresses admittedly

relevant evidence has a deleterious effect upon successful prosecution of crime. A California study of cases rejected for search and seizure considerations reflects that almost half of those individuals whose cases were rejected were rearrested within two years. That same California experience disclosed that almost one third of all felony drug arrests sampled were rejected at the time these cases were presented for filing to the prosecutor due to problems with search and seizure.

California voters have recognized the adverse impact upon public safety of excluding relevant evidence. The voters of this State have adopted an amendment to their Constitution which limits exclusion of relevant evidence to the

requirements of the federal constitution.

The objectives of the exclusionary rule, deterrence of future police conduct and assurance of "judicial integrity", are not furthered in instances when law enforcement seek and obtain judicial order for search and seizure of evidence. Indeed, more protection is afforded when officers are judicially encouraged to seek search warrants. It is urged that this Court adopt the good faith exception to the exclusionary rule.

ARGUMENT

A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD BE ADOPTED

The evolution of the exclusionary rule reflects the development of a concept which is by

no means monolithic or without controversy (see generally Kaplan, The Limits of the Exclusionary Rule, 26 Stan.L.Rev. 1027) (Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule, 69 J. Crim. L. & Criminology 635 (1978); Gifford, Constitutional Law: Search and Seizure - The Role of Police Officer Good Faith in Substantive Fourth Amendment Doctrine - Michigan v. DeFillippo (1979) 443 U.S. 31, 55 Wash.L.Rev. 849 (1980); Bringegar, Limiting the Application of the Exclusionary Rule - The Good Faith Exception, 34 Vand.L.Rev. 213 (1981); Leonard, The Good Faith Exception to the Exclusionary Rule: A Reasonable Approach for Criminal Justice, 4 Whittier L.R. 33 (1981)). Initially

conceived as relating both to the Fourth and Fifth Amendment (Boyd v. United States (1886) 116 U.S. 616, 632, 634-635, 6 S.Ct. 524, 29 L.Ed. 746), the exclusionary rule had been applied to the states under precepts of due process in Rochin v. California (1952) 342 U.S. 165, 186, 96 L.Ed. 183, 72 S.Ct. 205, until in Mapp v. Ohio (1961) 367 U.S. 643, 655, 6 L.Ed.2d 1081, 1090, 81 S.Ct. 1684 a plurality opinion of this Court stated "that all evidence obtained by searches and seizures in violation of the Constitution is ... inadmissible in a state court". However, only four justices subscribed to the view that the Fourth Amendment of the Constitution required the exclusion of unconstitutionally seized evidence in

state criminal trials.[2]

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[2] Only four of the five Supreme Court Justices who comprised the majority in Mapp v. Ohio, supra, 367 U.S. 643, were of the opinion that the Fourth Amendment of the Constitution required the exclusion of unconstitutionally seized evidence in state criminal trials. The majority opinion was authored by Justice Clark (id. at 643), the concurring opinion was by Justice Douglas (id. at 666). Justice Black stated in a concurring opinion that the Fourth Amendment, standing alone, did not bar from evidence items seized in violation of its commands. Only when the Fourth Amendment's ban against unreasonable searches and seizures is considered in conjunction with the Fifth Amendment's ban against self-incrimination did a constitutional basis emerge which required the exclusionary rule (id. at 661-662; see Justice Harlan's dissenting opinion (id. at 672)). Justice Stewart expressed no view on the merits of the constitutional issue before the Court. He would have reversed on the ground that the Ohio statute under which the defendant was convicted violated constitutional guarantees of free thought and expression (Id. at 682). Note that Justice Powell, writing for the six member majority in Stone v. Powell (1976) 428 U.S. 465, 49 L.Ed.2d 1046, 96 S.Ct. 3021), stated with respect to Mapp: "Only four Justices adopted the view that the Fourth Amendment itself requires the

Moreover, subsequent to Mapp v. Ohio, supra, this Court has reiterated that the exclusionary rule is judicially created and is not constitutionally mandated (United States v. Calandra (1974) 414 U.S. 338, 348, 38 L.Ed.2d 561, 571, 94 S.Ct. 613; United States v. Peltier (1975) 422 U.S. 531, 538, 45 L.Ed.2d 374, 95 S.Ct. 2313; United States v.

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exclusion of unconstitutionally seized evidence in state criminal trials." (Id. 428 U.S 465, 484 n. 21).

Janis (1976) 428 U.S. 433, 459-460, 49 L.Ed.2d 1046, 96 S.Ct. 3021; Stone v. Powell (1976) 428 U.S. 465, 482, 49 L.Ed.2d 1067, 96 S.Ct. 3037). The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim (United States v. Calandra, supra, 414 U.S. at 347). Rather the rule's prime purpose has been to deter future unlawful police conduct (United States v. Calandra, supra, 414 U.S. at 347; United States v. Peltier, supra, 422 U.S. at 536; United States v. Janis, supra, 428 U.S. 446), although empirical studies have never confirmed that the rule is effective in this respect (United States v. Janis, supra, 428 U.S. at 458, note 35; Stone v. Powell, supra, 428 U.S. at 484-485; Illinois v. Gates, supra,

___ U.S. ___, 103 S.Ct. 2317, Justice White concurring).[3] A subordinate purpose of the exclusionary rule, assurance of "judicial integrity" by not admitting illegally seized evidence in certain criminal proceedings (United States v. Janis, supra, 428 U.S. at 458, note 35; Stone v. Powell, supra, 428 U.S. at 484-485), "does not mean that the courts must never admit evidence obtained in violation of the Fourth

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[3] The most comprehensive study on the effectiveness of the deterrence purpose of the exclusionary rule is Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970), which is discussed together with other studies in footnote 22 of the opinion in United States v. Janis, supra. After discussing the various studies this Court in Janis states: "The final conclusion is clear. No empirical research, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect even in the situations in which it is now applied." (Id at 452.)

Amendment" (United States v. Janis, supra, 428 U.S. at 458, note 35). There is the recognition that the suppression of probative but tainted evidence exacts a costly toll upon the search for the truth in criminal proceedings (United States v. Payner (1980) 447 U.S. 727, 734, 65 L.Ed.2d 468, 476, 100 S.Ct. 2439; Illinois v. Gates, supra, ___ U.S. ___, 103 S.Ct. 2317, Justice White concurring). Thus, the rule is not applied where the defendant is not the direct recipient of the unlawful search (Rakas v. Illinois (1978) 439 U.S. 128, 58 L.Ed.2d 387, 99 S.Ct. 421). The exclusionary rule has not been extended to grand jury proceedings (United States v. Calandra, supra, 414 U.S. 338). It has been rejected in civil proceedings respecting the

return of unconstitutionally seized property (United States v. Janis, supra, 428 U.S. 433). The rule has been restricted in the area of relitigation of habeas corpus claims in federal courts (Stone v. Powell, supra, 428 U.S. 465). The application of the exclusionary rule is not required where law enforcement acts in good faith reliance upon a statute or ordinance which is subsequently held to be unconstitutional (United States v. Peltier (1975) 422 U.S. 531, 45 L.Ed.2d 374, 95 S.Ct. 2313; Michigan v. DeFillippo (1979) 443 U.S. 31, 61 L.Ed.2d 343, 99 S.Ct. 2627).

It has been repeatedly recognized by this Court that unbending application of the exclusionary rule undermines the

truth finding function of our criminal justice system (e.g. Rakas v. Illinois (1978) 439 U.S. at 137-138, 58 L.Ed.2d 387, 99 S.Ct. 421; United States v. Ceccolini (1978) 435 U.S. 268, 275-279, 55 L.Ed.2d 268, 92 S.Ct. 1054; Stone v. Powell (1976) 428 U.S. 465, 489-491, 49 L.Ed.2d 1067, 96 S.Ct. 3037; Michigan v. Tucker (1974) 417 U.S. 433, 450-451, 41 L.Ed.2d 182, 94 S.Ct. 2357); United States v. Calandra, supra, 414 U.S. at 348, 38 L.Ed.2d 561, 94 S.Ct. 613; United States v. Payner, supra, 447 U.S. at 734, 65 L.Ed.2d at 476, 100 S.Ct. 2439).

A report by the National Institute of Justice of the United States Department of Justice (Criminal Justice Research Report,

The Effect of the Exclusionary Rule, Study in California, December, 1982) illustrates the extent to which the exclusionary rule exacts a severe price upon a society which seeks to protect itself from crime. That Criminal Justice Research report reveals that almost half the individuals in California whose cases were rejected for search and seizure problems were rearrested within two years. An analysis of the nature of the felony rearrests disclosed that although many rearrests were for drug crimes, the majority of the rearrests were for personal property crimes or other felony arrests (id. at 18). The report reflects that in the area of felony drug arrests, 32.5% of all felony drug arrests referred for prosecution to the Pomona Branch

Office of the Los Angeles County District Attorney's Office in 1981 were rejected at the time these cases were presented to the prosecutor for filing due to problems with search and seizure. A sample of drug cases submitted to the Central Office of the Los Angeles District Attorney disclosed a 29% rejection rate due to search and seizure problems (id. at pages 2, 13). Moreover, the report concluded that the data analyzed in the study tended to understate the net effect of the exclusionary rule (id. at page 9). In light of the toll the rule exacts from society, it is unjustifiable to exclude evidence seized incident to execution of a search warrant which was obtained in good faith.

The exclusionary rule "has

been restricted to those areas where its remedial objectives are thought most efficaciously served." (United States v. Calandra (1974) 414 U.S. 338, 348, 38 L.Ed.2d 561, 94 S.Ct. 613; United States v. Payner, supra, 447 U.S. at 734, 65 L.Ed.2d at 476, 100 S.Ct 2439). These objectives are not furthered in instances, as the case at bar, where police conduct is reasonable and in good faith.

In respect to the issuance and execution of search warrants, it is urged that where an officer, in good faith, seeks and obtains judicial sanction under warrant to search and seize property, the evidence obtained should not be suppressed. Massachusetts v. Sheppard (1982) ___ N.E.2d ___, 387 Mass. 488 exemplifies the necessity

for this rule. The Supreme Judicial Court of Massachusetts characterized the issue presented to be: "The question is whether an error of a magistrate, unrelated to police error, calls for application of the exclusionary rule." (Id., 387 Mass. at 503). This Court has recognized that police are encouraged to seek judicial authorization for searches and seizures whenever possible (United States v. Ventresca (1965) 380 U.S. 102, 105-106, 111-112, 13 L.Ed.2d 684, 85 S.Ct. 741). The Fourth Amendment's preference is for searches conducted pursuant to warrant (United States v. Ventresca, supra, 380 U.S. at 109, Illinois v. Gates, (1983) ___ U.S. ___, 103 S.Ct. 2317, 2331). Search warrants judicially command the search for and

seizure of items based upon the prior judicial determination that the search is lawful. When a law enforcement officer, in good faith, applies to a judge or magistrate for a search warrant, and, the affidavit for the warrant is considered before the warrant is issued, the police officer has thereby, done everything possible to comply with the dictates of the Fourth Amendment. As long as police, in good faith,[4] present to a judge or magistrate an affidavit describing all the facts known to them which they believe establishes probable cause for a search and seizure and the judge or magistrate

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4 Where the affidavit contains false statements knowingly and intentionally or recklessly made, the application for warrant cannot be deemed to have been requested in good faith (see Franks v. Delaware (1978) 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674).

then issues a search warrant, the evidence recovered thereby should be admissible. The search thereunder occurs in a reasonable manner.

By requesting a search warrant the police have sought a judicial order to search for and seize evidence. The responsibility of the judge or magistrate now becomes to review and grant or deny the request for the search warrant. Society should not be punished once the police have acted in good faith and done everything reasonably possible to seek judicial sanction for their conduct. Good faith reliance on the warrant, once it is issued, should validate the search thereunder. The rules of the game should not be changed once the game is played.

Any inadequacies which are found subsequent to the issuance of the search warrant cannot be attributable to the police and thus the prime purpose of the exclusionary rule (deterrence of future unlawful police conduct) cannot be "efficaciously served" (United States v. Calandra, supra, 414 U.S. at 414) by suppressing the evidence. A secondary purpose of the exclusionary rule, assurance of "judicial integrity", is not undermined where the police have done everything possible in good faith to present a complete and accurate request for a judicial order to search for and seize evidence. Indeed, society will be better protected from unlawful conduct if the police are encouraged to obtain search warrants. Police

officers often have a choice as to whether they will engage in a search or seizure with or without a warrant. If the lawfulness of their actions is afforded protection when they use a warrant, it is more likely that they will seek warrants and that their activities will be judicially reviewed before they act rather than after. Ultimately, this Court must decide whether it is better to have judges and magistrates review affidavits for search warrants before searches are conducted or to have appellate review after the search (i.e. Monday morning quarterbacking). Those who are law abiding and need protection against unlawful police conduct would certainly be better protected by the former, rather than the latter. A

search of a law abiding person will never afford the judiciary with an opportunity for judicial review after the search is conducted because incriminating evidence by definition (i.e. law abiding), will not have been found.

CONCLUSION

In 1982 the voters of the State of California in a statewide primary election, adopted an initiative, Proposition 8, which modified the California Constitution so as to conform California rules respecting the admissibility of seized evidence to the federal constitutional model (Proposition 8, California Constitution, Article I, Section 28, subdivision (d)).[5] The

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5 California Constitution, Article I, Section 28, subdivision (d) states:

People of this state recognized, in enacting that initiative, that society must be more effectively protected from crime (Proposition 8, California Constitution, Article I,

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> "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

It was recognized that "[t]he measure [California Constitution, Article I, Section 28, subdivision (d)] could not affect federal regulations on the use of evidence" (California Ballot Pamphlet, Primary Election June 8, 1982, emphasis in original, Analysis by the Legislative Analyst, p. 32.)

Section 28, subdivision (a)).[6]

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[6] California Constitution Article I, Section 28, subdivision (a) is a preamble to Proposition 8 which states:

> "The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights is a matter of grave statewide concern.
>
> The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.
>
> Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons.

Californians now look to this Court for the standard to be applied in respect to the admission of previously seized evidence. The Court should adopt the good faith

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> To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives."

exception to the exclusionary rule.

Respectfully submitted on behalf of
the Appellate Committee of the
California District Attorney's
Association

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

Attorney for the Appellate Committee
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Association

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County, under the supervision of Roderick W. Leonard, Deputy District Attorney, a member of the bar of this court at whose direction the service was made, with principal offices located at 849 South Broadway, Los Angeles, California 90014-3296; that the District Attorney is the amicus curiae on behalf of the Petitioner in

the above-entitled matter. On September 14, 1983, I served three copies of the foregoing on the following persons and Courts by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS
ROOM 1412
NEW COURT HOUSE
BOSTON MA 02108

SUFFOLK SUPERIOR COURT
FOR CRIMINAL BUSINESS
SEVENTH FLOOR
NEW COURT HOUSE
BOSTON MA 02108

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FRANCIS X. BELLOTTI
ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON MA 92108

ATTN: BARBARA A. H. SMITH
ASST. ATTY. GEN.
CHIEF, CRIMINAL
APPELLATE DIVISION

JOHN REINSTEIN, ESQ.
MASSACHUSETTS CIVIL
LIBERTIES UNION FOUNDATION
47 WINTER STREET
BOSTON MA 92108

Executed on September 14,

1983 at Los Angeles, California.

_____

MARK NAGAI

DECLARATION OF SERVICE ON THE COURT

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

The undersigned, Roderick W. Leonard, Deputy District Attorney, is a member of the bar of this Court. On September 14, 1983, under my supervision, Cecil Patterson, an employee of the office of the District Attorney of Los Angeles County, placed in the United States mail, with first class postage prepaid and via U. S. Postal Service Express mail, with postage prepaid, a box containing forty copies of the instant brief accompanied by an entry of appearance addressed as follows:

Office of the Clerk
United States Supreme Court
Washington DC 20543

An amicus curiae brief in this matter was originally mailed (with service on the appropriate parties) on September 6, 1983 which is within the permitted time and, pursuant to a discussion with members of the Office of the Clerk of this Court is being resubmitted at this time to correct a technical defect.

RODERICK W. LEONARD